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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DONALD W. WYRICK,
Petitioner,

v.

WILLIE WILLIAMS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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STEVEN W. GARRETT
Assistant Attorney General
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KELLY PRESS, INC., 201 S. Eighth St., Columbia, Missouri Dial 314/449-4163

QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is violated by convicting a defendant, in one proceeding, of both first degree robbery, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975, and armed criminal action, § 559.225, RSMo Supp. 1976, where the proof required to establish a violation of the former is necessarily required to prove a violation of the latter?

2. Whether the Missouri Supreme Court is bound by *Brintley* v. *Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), a decision of this Court dismissing an appeal (wherein the same federal constitutional issue was raised) for want of a substantial federal question?

3. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980), wherein that court held that convicting respondent in a single proceeding of both first degree robbery and armed criminal action violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, conflicts with this Court's decision in *Brintley* v. *Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.ED.2d 317 (1979); therein this Court dismissed, for want of a substantial federal question, an appeal which sought to review the Michigan Supreme Court's decision holding that the double jeopardy clause of the Fifth Amendment to the United States Constitution was not violated by convicting a defendant in a single proceeding of both armed robbery, § 750.593, M.C.L.A., and possession of a firearm during the commission of a felony, § 750.227(b), M.C.L.A.

4. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980),

conflicts with this Court's decision rendered in *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)?

5. Whether the Missouri Supreme Court's Order and Writ of Habeas Corpus issued in *Williams* v. *Wyrick*, No. 62879 (Mo. banc, June 15, 1981), conflicts with this Court's decision in *Albernaz* v. *United States*, 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981)?

6. Whether the Missouri Supreme Court's Order and Writ of Habeas Corpus issued on June 15, 1981 is proper in light of the orders issued by this Court in *Missouri* v. *Counselman*, No. 80-754; *Missouri* v. *Brown*, No. 80-1368; *Missouri* v. *Greer*, No. 80-997; and *Missouri* v. *Lowery*, No. 80-1561?

PARTIES

In the Missouri Supreme Court, the parties were: Willie Williams, petitioner, and Donald W. Wyrick, respondent.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DONALD W. WYRICK,
Petitioner,

v.

WILLIE WILLIAMS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

PETITION FOR CERTIORARI

Petitioner, Donald Wyrick, Warden, Missouri State Penitentiary, respectfully requests that a writ of certiorari issue to review the final order of the Missouri Supreme Court in this case.

OPINIONS BELOW

The Missouri Supreme Court's Order and Writ of Habeas Corpus is styled and numbered as follows: Willie Williams, a/k/a Willie J. Williams, petitioner, v. Donald W. Wyrick, Warden, Missouri State Penitentiary, respondent. A copy of the Order is reprinted as Appendix A.

A copy of Willie Williams petition for a writ of habeas corpus filed in the Missouri Supreme Court is reprinted as Appendix B.

A copy of Donald Wyrick's "Response To Order to Show Cause Why a Writ of Habeas Corpus Should Not Issue" is reprinted as Appendix C.

A copy of the "Return" filed by Donald Wyrick is reprinted as Appendix D.

JURISDICTIONAL STATEMENT

The Missouri Supreme Court's Order and Writ of Habeas Corpus was issued in this cause on June 15, 1981. Consequently, the present petition is filed within sixty days after the entry of judgment in this case, and this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 560.120, RSMo 1969, § 560.135, RSMo Supp. 1975, and § 559.225, RSMo Supp. 1976 are set forth in Appendix E.

STATEMENT OF THE CASE

This petition is brought as a result of the Missouri Supreme Court's "Order and Writ of Habeas Corpus" releasing Willie Williams from incarceration at the Missouri State Penitentiary, Jefferson City, Missouri. This history of this case is as follows:

Respondent, Willie Williams, was convicted of robbery first degree, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975, and armed criminal action, § 559.225, RSMo Supp. 1976. Respondent was sentenced to five years and seven years imprisonment respectively. Furthermore, the sentences were ordered to be served consecutively.

On February 25, 1981, respondent completed service of his robbery first degree sentence and commenced service of his seven year armed criminal action sentence. Thereafter, on March 5, 1981, respondent, Willie Williams, filed a petion for writ of mandamus and/or writ of habeas corpus in the Supreme Court of Missouri.

On April 6, 1981, the Missouri Supreme Court ordered petitioner, Donald Wyrick, to show cause why a writ of habeas corpus should not issue. Thereafter, on April 10, 1981, petitioner filed his response to order to show cause why a writ of habeas corpus should not issue. On May 26, 1981, petitioner, Donald Wyrick, filed his return.

The Missouri Supreme Court issued its order and writ of habeas corpus releasing Willie Williams from custody on June 15, 1981.

Approximately three weeks after respondent filed his petition for a writ of habeas corpus in the Missouri Supreme Court, this Court issued an order in the case of *Missouri* v. *Counselman*, No. 80-754, granting certiorari, vacating judgments, and remanding five cases to the Missouri Court of

Appeals, Eastern District, for further consideration in light of *Albernaz* v. *United States*, 450 U.S. ____ (1981). Each of the cases remanded to the Court of Appeals in *Counselman* had relied on the Missouri Supreme Court decision of *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980).

On March 30, 1981, this Court remanded several more cases back to the Missouri Court of Appeals, Western District, in *Missouri* v. *Brown*, No. 80-1368. This Court's order in *Brown* was identical to the order issued in *Counselman*. On May 26, 1981, this Court remanded several more cases back to the Missouri Supreme Court; in *Missouri* v. *Greer*, No. 80-997; again, the order was identical to the orders issued in *Counselman* and *Brown*.

On June 8, 1981, this Court remanded yet another case back to the Missouri Court of Appeals, Eastern District, in *Missouri* v. *Lowery*, No. 80-1561. This Court's order in *Lowery* was identical to the orders issued in *Counselman*, *Brown*, and *Greer*.

With the aforementioned orders of this Court outstanding, the Missouri Supreme Court issued its order and writ of habeas corpus in the instant case on June 15, 1981, releasing respondent, Willie Williams, from the custody of the Missouri Division of Corrections based on the Missouri Supreme Court's stated belief that Williams confinement for armed criminal action, the sentence for which had been obtained in a proceeding in which Williams had also been convicted of robbery first degree, was violative of the Fifth Amendment as per *Sours* v. *State*, *supra*.

In addition to the cases remanded back to the Missouri Supreme Court by this Court in *Missouri* v. *Greer*, No. 80-997, the cases remanded back to the Missouri Court of Appeals in *Missouri* v. *Counselman*, No. 80-754, and *Missouri* v. *Brown*, No. 80-1358 have been transferred to the Missouri Supreme Court by the respective Missouri Courts of Appeals.

Consequently, the Missouri Supreme Court's "Order And Writ Of Habeas Corpus" in the instant case was issued after this Court had remanded several cases for reconsideration. It is from the Missouri Supreme Court's order of June 15, 1981, that petitioner seeks this Court's review.

THE REASONS FOR GRANTING THE WRIT

Petitioner submits that a writ of certiorari should issue because the Missouri Supreme Court's "Order And Writ Of Habeas Corpus" issued on June 15, 1981, which relied on *Sours* v. *State,* 603 S.W.2d 592 (Mo. banc 1980) conflicts with recent decisions of this Court. Respondent submits that, in view of this Court's recent decision in *Albernaz* v. *United States,* 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), the Missouri Supreme Court erroneously ordered the release of respondent from custody because it relied on its decision in *Sours* v. *State, supra,* a decision which conflicts squarely with *Albernaz.* In *Albernaz,* this Court held that:

> [T]he question of what punishments are constitutionally permissible is not different from the question of what punishment the legislative branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution. [Footnote omitted].

Albernaz v. *United States, supra,* 101 S.Ct. at 1145. In view of the fact that the Missouri Supreme Court in *Sours, supra,* held that the legislature unquestionably intended that punishment be imposed for both armed criminal action and its predicate felony, respondent's armed criminal action sentence violates no federal constitutional right. Indeed, respondent was released from custody solely because the Missouri Supreme Court was of the opinion that his right not to be placed twice in jeopardy had been violated.

Respondent believes that certiorari should be granted in this cause because the Missouri Supreme Court released respondent pursuant to its erroneous decision rendered in *Sours* v. *State, supra.* The Missouri Supreme Court's action was taken after it had been ordered by this Court to reconsider its judgments which relied on *Sours* v. *State* in light of *Albernaz* v. *United States.* Consequently, the Missouri Supreme Court is exhibiting a recalcitrant posture which not only defies several orders of this Court, but also has created tremendous consternation in the Missouri criminal justice system.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

PAUL ROBERT OTTO
Assistant Attorney General

Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner

STEVEN W. GARRETT
Assistant Attorney General
of Counsel

APPENDIX A

IN THE

SUPREME COURT OF MISSOURI
EN BANC

June 15, 1981

WILLIE WILLIAMS, a/k/a WILLIE J. WILLIAMS, *Petitioner,* vs. DONALD W. WYRICK, Warden, Missouri State Penitentiary, *Respondent.*	No. 62879

ORDER AND WRIT OF HABEAS CORPUS

The State of Missouri, to Donald W. Wyrick, Warden, Missouri State Penitentiary, or his successor in office.

GREETINGS:

The petition of Willie J. Williams for writ of habeas corpus being filed before the Supreme Court of Missouri, en banc, and the response to our order to show cause thereof having been read and considered, and it appearing that the undisputed facts stated in the petition and the return clearly demonstrate that said Willie J. Williams' conviction for armed criminal action, § 559.225, RSMo Supp. 1976, for which he is presently confined is void, and no sufficient cause for the continued detention of said Willie J. Williams appearing, it is hereby ordered that a writ of habeas corpus is ordered to issue and that the judgment of conviction en-

tered against said Willie J. Williams for armed criminal action is vacated and for naught held, and that said Willie J. Williams, be by the said Donald W. Wyrick, Warden of the Missouri State Penitentiary, or his successor in office, forthwith discharged from imprisonment and detention, for the cause aforesaid. *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980).

We further find that the applicant Willie Williams and Willie J. Williams in Missouri Court of Appeals, Eastern District, Case No. 41984 and Willie J. Williams in Circuit Court of the City of St. Louis, Case No. 78-563, are one and the same person.

It is further ordered that pursuant to the writ of habeas corpus granted herein, the judgment of conviction for armed criminal action, § 559.225, RSMo Supp. 1976, entered against Willie J. Williams, is hereby vacated, set aside, and held for naught and a copy hereof is transmitted to the Missouri Court of Appeals, Eastern District, with directions to rule the pending motion for rehearing consistent with this writ and to issue its mandate to the Circuit Court of the City of St. Louis with directions to vacate said judgment of sentence on the official records of the Circuit Court of the City of St. Louis in the case of *State* v. *Willie J. Williams*, Circuit Court No. 78-563.

Day - to- Day

JOHN E. BARDGETT, Chief Justice

All concur, except Rendlen, J.,
who concurs in result.

STATE OF MISSOURI—SCT.:

I, THOMAS F. SIMON, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the order of said court, entered on the 15th day of June 1981, as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 15th day of June, 1981.

Thomas Simon, Clerk.

Anne Berhorst, D.C.

APPENDIX B

IN THE

SUPREME COURT OF MISSOURI

STATE OF MISSOURI

STATE ex rel. WILLIE WILLIAMS, Reg. No. 37205 *Petitioner,* vs. DONALD W. WYRICK, Warden, *Respondent.*	**No. 62879**

PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF HABEAS CORPUS

Comes now Willie Williams, petitioner herein, pro se, and would respectfully move this Honorable Court to issue a Writ of Mandamus Ordering the Honorable Judge James T. Riley, 19th Judicial Circuit, to issue a Writ of Habeas Corpus compeling the respondent in the above-entitled cause to release petitioner from his present unlawful restrain of his liberty by respondent or in the alternative this Honorable Court issue the said Writ of Habeas Corpus and for this cause of action would respectfully submit the following, to-wit:

1. This Honorable Court has jurisdiction pursuant to RSMo 1978 Chapters 529 and 532 and Article V, Section 4 of the Constitution of Missouri.

2. Petitioner respectfully submits that no application for the relief sought has been made to or refused by any court, officer or officers, superior to this Honorable Court.

3. Petitioner is presently being confined unlawfully

at the Missouri State Penitentiary at Jefferson City, Missouri.

4. Respondent is the Warden of the Missouri State Penitentiary and is legal custodian over the petitioner.

5. On February 19, 1981, petitioner, petitioned the Honorable Judge James T. Riley, 19th Judicial Circuit, Missouri, Circuit Court of Cole County, for the issuance of a Writ of Habeas Corpus. Petitioner alleged that the present sentence he is now serving is illegal and unconstitutional for the reason that this Honorable Court has held that convicting a defendant of armed criminal action and the underlying felony constitutes a violation of the prohibition against double jeopardy. *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc, Jan. 1980) (Sours I); by authority of *Whalen* v. *United States,* 445 U.S. ____, 100 S.Ct. 1432 (1980), the United States Supreme Court ordered *Sours I* vacated and reconsidered. *Missouri* v. *Sours,* 27 Crim.L. Rptr. 4071, No. 79-1565 (S.Ct., filed May 27, 1980). Upon reconsideration, the Missouri Supreme Court re-affirmed its findings that conviction of armed criminal action and the underlying felony constitutes a violation of the prohibition against double jeopardy. *Sours* v. *State,* 603 S.W.2d 592 (Mo. banc, Aug. 1980) (Sours II).

6. Petitioner submits to this Honorable Court that he was sentenced by the Circuit Court for the City of St. Louis to terms of imprisonment for the offenses of robbery and armed criminal action arising out of the same transaction; the robbery sentence that was imposed by the circuit court has been served effective February 25, 1981, and petitioner is presently serving the armed criminal action sentence which was imposed by the St. Louis Circuit Court. Thus, by reason of this Court's mandate in *Sours I* and *II,* petitioner is presently serving a sentence which is illegal and void; petitioner's continued confinement is violative of his rights as guaranteed by Article I, Sections

2 and 10 of the Missouri Constitution and the 5th and 14th Amendments to the United States Constitution.

7. On February 26, 1981, the Honorable Judge James T. Riley, 19th Judicial Circuit, Missouri, Circuit Court of Cole County, denied petitioner's petition for Writ of Habeas Corpus holding that petitioner's "proper and more adequate remedy is by proceeding under the provisions of Supreme Court Rule 27.26 in the Circuit Court where he was convicted and sentenced." (See attached sheet)

8. Petitioner submits to this Honorable Court that in a habeas corpus proceeding identical to the instant proceeding this Honorable Court Ordered a Writ of Habeas Corpus to issue for the release of a petitioner who was similarly situated as the petitioner in the instant proceeding. See *Lawrence Ray Burrow* v. *Carl White*, (Mo. banc, May 1, 1980) (Cause No. 61967, filed May 1, 1980). This authority was submitted to the Honorable Judge James T. Riley via Petitioner's Exhibit "A". Thus, Judge Riley had this authority before the court when he denied petitioner's petition.

WHEREFORE, petitioner prays this Honorable Court issue a Writ of Mandamus compeling the Honorable Judge James T. Riley to issue a Writ of Habeas Corpus forthwith for the IMMEDIATE release of petitioner from his unlawful restrain of his liberty, or in the alterative, this Honorable Court issue a Writ of Habeas Corpus for the IMMEDIATE release of petitioner and grant petitioner all other relief this Honorable Court deems just and proper within the premise. IT IS SO PRAYED.

Respectfully submitted,

Willie Williams, pro se
Reg. No. 37205
P.O. Box 900
Jefferson City, Mo. 65102

STATE OF MISSOURI } SS
COUNTY OF COLE }

VERIFICATION AND FORMA PAUPERIS AFFIDAVIT

I, Willie Williams, after first being duly sworn, depose, and swears that he has read the above and foregoing petition; it is true to his best knowledge and belief; that he is a poor person within the meaning of the law and cannot pay the cost of these proceedings; that he has a just cause of action; that he is entitled to the relief sought.

Willie Williams
AFFIANT

Subscribed And Sworn To Before Me This Mar. 2, 1981

Oscar D. Dunbar
NOTARY PUBLIC

My Commission Expires: August 1, 1984

IN THE

SUPREME COURT OF MISSOURI

STATE OF MISSOURI

STATE ex rel. WILLIE WILLIAMS, Reg. No. 37205 *Petitioner,* vs. DONALD WYRICK, Warden, *Respondent.*	No._____

SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND/OR HABEAS CORPUS

Comes now Willie Williams, petitioner herein, pro se, and would respectfully move this Honorable Court to take judicial notice of the following in support of petitioner's motion for Writ of Mandamus and/or Writ of Habeas Corpus, to-wit:

1. On March 2, 1981, petitioner filed a motion for a Writ of Mandamus and/or a Writ of Habeas Corpus in this Honorable Court.

2. Petitioner alleged that he is being unlawfully confined in the Missouri State Penitentiary as a result of serving a conviction for armed criminal action which this Honorable Court has held to be void.

3. Petitioner would respectfully move that this Honorable Court take judicial notice that on February 24, 1981

the Missouri Court of Appeals, Eastern District, reversed petitioner's conviction for armed criminal action. (See Opinion Attached).

Respectfully submitted,

Willie Williams, pro se
Box 900
Jefferson City, Mo. 65102

Subscribed And Sworn To Before Me This Mar. 03, 1981

My Commission Expires: August 1, 1984

Robert A. Foreman
NOTARY PUBLIC

APPENDIX C

IN THE

SUPREME COURT OF MISSOURI

WILLIE WILLIAMS, *Petitioner,* v. DONALD W. WYRICK, Warden, Missouri State Penitentiary, *Respondent.*	**No. 62879**

RESPONSE TO ORDER TO SHOW CAUSE WHY A WRIT OF HABEAS CORPUS SHOULD NOT ISSUE

Comes now respondent, Donald Wyrick, Warden, Missouri State Penitentiary, by and through John Ashcroft, Attorney General, and Steven W. Garrett, Assistant Attorney General, and, in response to this court's order of April 6, 1981, directing respondent to show cause why a writ of habeas corpus should not issue, makes the following statement:

Statement As To Custody

Petitioner, Willie Williams, is presently being detained in the Missouri State Penitentiary for Men at Jefferson City, Missouri, pursuant to a valid judgment and sentence entered in the Circuit Court of the City of St. Louis, Missouri, where petitioner was convicted of robbery first degree and armed criminal action. On February 25, 1981, petitioner completed service of his robbery first degree sentence and commenced service of his seven year armed criminal action sentence.

Argument As To Why Relief Should Not Be Granted

Respondent submits that, in view of recent developments in the law concerning the application of the Double Jeopardy Clause of the Fifth Amendment, petitioner should be denied habeas corpus relief. Although respondent recognizes that the most recent pronouncement of this court concerning the Fifth Amendment to the United States Constitution, to-wit: *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980), would require that petitioner's armed criminal action conviction be vacated, the recent United States Supreme Court decision of *Albernaz* v. *United States*, 49 L.W. 4237 (March 9, 1981), relying on *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), held that:

> [T]he question of what punishments are constitutionally permissible is not different from the question of what punishment the legislative branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the constitution.

Albernaz, supra, 49 L.W. 4240. [Footnote omitted.] Consequently, in view of the fact that this court, in *Sours, supra*, held that the legislature unquestionably intended that punishment be imposed for both armed criminal action and its predicate felony, petitioner's armed criminal action sentence violates no federal constitutional right.

Subsequently to the Supreme Court's rendering its opinion in *Albernaz, supra*, several orders of the Court were issued in cases wherein the double jeopardy issue had been raised. On March 23, 1981, the Court vacated judgments and remanded two cases back to the Supreme Court of Delaware for further consideration in light of *Albernaz v. United States, supra*. See 28 Cr.L.Rep. 4248. Previously,

the Delaware Supreme Court had rendered an opinion similar to that rendered by this Court in *Sours* v. *State, supra.* The Delaware Supreme Court had held that, although the legislative intent to impose two punishments was clear, it violated the Fifth Amendment to the United States Constitution to impose punishments for both Delaware's equivalent to Missouri's armed criminal action statute and its predicate felony. That same day, the Supreme Court vacated judgments and remanded five cases back to the Missouri Court of Appeals, Eastern District, ordering that each case be further considered in light of *Albernaz, supra.* See *Missouri* v. *Counselman,* 28 Cr.L.Rep. 4248.

In another action taken by the United States Supreme Court on March 23, 1981, the direct appeal taken by the defendant in *Whack* v. *Maryland,* was dismissed for want of jurisdiction. Treating the papers filed as a petition for a writ of certiorari, the Court denied said petition. See 28 Cr.L.Rep. 4248. The Court's disposition of *Whack, supra,* is instructive because the defendant therein had appealed from a decision of the Maryland Appellate Court which held that it is constitutionally permissible to convict and sentence for both Maryland's equivalent to Missouri's armed criminal action statute and its predicate felony.

In an action taken on March 30, 1981, the United States Supreme Court vacated the judgment in *Missouri* v. *Brown* (joined with four other cases) and remanded the cases back to the Missouri Court of Appeals, Western District, for further consideration in light of *Albernaz, supra.* See 29 Cr.L.Rep. 4001.

Respondent submits that the only logical inference that can be drawn from the recent United States Supreme Court orders, combined with the clear and unequivocal logic and intent of *Albernaz* v. *United States, supra,* is

that the United States Supreme Court believes that the result reached by this court in *Sours* v. *State, supra,* should be reversed. Consequently, petitioner has no federal constitutional right that is being violated due to his confinement in connection with his armed criminal acton conviction.

WHEREFORE, for the foregoing reasons, respondent requests this court to dismiss the petition without further proceedings. Should this court issue a preliminary writ, respondent requests that this court docket this case for its May, 1981 session.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

STEVEN W. GARRETT
Assistant Attorney General

Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Respondent

CERTIFICATE OF SERVICE: I hereby certify that a true and correct copy of the foregoing document was mailed, postage prepaid, this 10th day of April, 1981, to:

Willie Williams
Reg. No. 37205
P.O. Box 900
Jefferson City, MO 65102

STEVEN W. GARRETT

APPENDIX D

IN THE

SUPREME COURT OF MISSOURI

WILLIE WILLIAMS, *Petitioner,* v. DONALD W. WYRICK, Warden, Missouri State Penitentiary, *Respondent.*	No. 62879

RETURN

Comes now Donald W. Wyrick, Warden, Missouri State Penitentiary by and through Attorney General John Ashcroft, and his Assistant, Steven W. Garrett, and in return to this Court's writ of habeas corpus states as follows:

1. That respondent, in performance of his statutory duties and responsibilities, has custody of the petitioner;

2. That respondent has custody of the petitioner pursuant to a valid sentence and judgment entered against petitioner;

3. That petitioner is presently being detained in the Missouri State Penitentiary, Jefferson City, Missouri;

4. That production of the petitioner before this Court to be dealt with according to law was waived by this Court's order;

5. That petitioner was charged with and convicted of robbery first degree and armed criminal action whereafter, on August 17, 1979, a valid sentence and judgment was entered against petitioner;

6. That petitioner was sentenced to five years imprisonment for robbery first degree and seven years imprisonment for armed criminal action, the latter sentence to run consecutive to the former;

7. That on February 25, 1981, petitioner completed service of his robbery first degree sentence and commenced service of his seven year armed criminal action sentence;

8. That respondent denies that petitioner is being illegally confined in violation of his Fifth Amendment right not to be placed twice in jeopardy;

9. That, although respondent recognizes that the most recent pronouncement of this Court concerning the Fifth Amendment to the United States Constitution, to wit: *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980), would require that petitioner's armed criminal action conviction be vacated, the recent United Supreme Court decision of *Albernaz* v. *United States*, 49 L.W. 4237 (March 9, 1981), relying on *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), clearly indicates that *Sours*, *supra*, incorrectly elucidates the law on double jeopardy;

10. That this court's previous holding that the legislative intent to punish in regard to armed criminal action is unmistakably clear, combined with the holding of *Albernaz*, *supra*, wherein the United States Supreme Court stated that the question of what punishments are constitutionally permissible is not different from the question of what punishment the legislature intended to be imposed, renders petitioner's claim insubstantial.

WHEREFORE, respondent respectfully request this court to quash the writ of habeas corpus heretofore granted and to remand petitioner to the respondent's custody.

Respectfully submitted,

DONALD W. WYRICK, Warden,
Missouri State Penitentiary

Subscribed and sworn to me this 26 day of June 1981.

Mary V. Moody
NOTARY PUBLIC, in and for the
County of Cole, State of Missouri

My commission expires: May 27, 1982

CERTIFICATE OF SERVICE: I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 26th day of May, 1981, to:

Ms. Leslie Edwards
Assistant Public Defender
1320 Market Street
St. Louis, Missouri 63103

Willie Williams
Reg. No. 37205
P.O. Box 900
Jefferson City, MO 65102

STEVEN W. GARRETT

APPENDIX E

Section 560.120, RSMo 1969, reads as follows:

560.120. Robbery in first degree.—Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

Section 560.135, RSMo 1975 Supp., reads as follows:

560.135. Armed robbery, punishment for.—Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years; every person convicted of robbery in the second degree shall be punished by imprisonment by the division of corrections not exceeding five nor less than three years; every person convicted of robbery in the third degree shall be punished by imprisonment by the division of corrections not exceeding five years.

Section 559.225, RSMo 1976 Supp., reads as follows:

559.225. Armed criminal action—penalty—exceptions. —1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of

armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee [sic] by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

No. 80-2200

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD W. WYRICK,

Petitioner

v.

WILLIE WILLIAMS,

Respondent,

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOSEPH W. DOWNEY
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Willie Williams

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Opinions Below

Willie Williams, a/k/a Willie J. Williams v. Donald W. Wyrick, No. 62879 (Mo. banc 1981), attached in State's petition as Appendix A

Constitutional and Statutory Provisions Involved

Respondents add to the statutory provisions cited by petitioner the following.

Section 556.041(1), RSMo 1978, reads in relevant part:

> Section 556.041. Limitations on conviction for multiple offenses. -- When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if
>
> (1) One offense is included in the other, as defined in section 556.046;

Section 556.046.1(1), R.S.Mo. 1978, reads in relevant part:

> 556.046. Conviction of included offenses. -- 1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when
>
> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

Summary of Argument

I

The decision of the Missouri Supreme Court does not conflict with applicable decisions of this Court because this Court has not decided the issue presented here.

II

The federal constitutional issue involved has been nullified by subsequent enactments of the Missouri General Assembly and by construction of those enactments by the Missouri Supreme Court.

Argument

I

Petitioner contends that the decision of the Missouri Supreme Court in Williams v. Wyrick, No. 62879 (Mo. banc 1981) holding that Respondent's conviction under Section 559.225 R.S.Mo. Supp. 1976 for armed criminal action violates the double jeopardy clause of the United States Constitution, Amendment V, conflicts with decisions of this Court. Principal reliance is placed on Albernaz v. United States, 450 U.S. _____ , 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). The separate offenses of which Albernaz was convicted satisfied the test of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), each requiring proof of a fact the other did not. Albernaz does not govern the situation presented in these

cases of simultaneous conviction for armed criminal action and the underlying felony necessary to be proved under the Missouri armed criminal action statute.

Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), although distinguishable to the extent that it involved multiple prosecutions, stands for the proposition that when a greater crime (in Harris, felony-murder) cannot be proved without proof of a lesser crime (the underlying felony), the two are the same offense for double jeopardy purposes.

In Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), it was decided that the Congressional intent was not to authorize consecutive sentences for felony-murder and the underlying felony of rape. Whalen did not reach the issue of whether Congress could constitutionally have authorized consecutive sentences.

Petitioner, in his "Questions Presented," cites Brintley v. Michigan, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979). This makes too much of a memorandum decision dismissing the appeal for want of a substantial federal question. Such a decision breaks no new ground, but applies only to the "precise issues" and "particular facts" involved in the judgment appealed from. Mandel v. Bradley, 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977). It intimates nothing with regard to Missouri law.

II

The issue on which petitioner seeks review is not "an important question of federal law which has not been, but should be, settled by this court . . ." Supreme Court Rule 17.1(c). It has, in fact, been rendered moot by subsequent enactments of the Missouri General Assembly.

In 1977, the Legislature enacted a new Criminal Code, Section 556.011 et seq., R.S.Mo. 1978, effective January 1, 1979. Two provisions of that Code are pertinent here. Section 556.041 forbids conviction of more than one offense arising out

of the same conduct if "(1) One offense is included in the other, as defined in section 556.046." The latter provides in relevant part:

> 1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; . . .

The Missouri Supreme Court has recently considered the impact of these provisions on the armed criminal action statute, now Section 571.015, R.S.Mo. 1978, reenacted as part of the same Criminal Code. In State ex rel. Westfall v. Ruddy, _____ S.W.2d _____, No. 61958 (Mo. banc 1981), the court held that conviction of both armed criminal action and the underlying felony was forbidden by the above-cited statutes. The prosecution henceforward may charge an accused with both offenses and may submit both to the jury, but only in the alternative.

With Ruddy, the federal double jeopardy issue has been rendered moot. Since this Court does not review a state supreme court's construction of a state statute, Memorial Hospital v. Maricopa County, 415 U.S. 250, 256, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974), a grant of certiorari would serve no purpose.

Respondents submit that the federal question in these cases is untimely presented and of no such significance as to merit review on writ of certiorari.

Conclusion

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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Assistant Public Defender

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Willie Williams

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Willie Williams moves this court for an order permitting him to proceed in this court in forma pauperis, pursuant to Supreme Court Rule 46, as party respondent in the above-captioned cause. Affidavit in support of this motion are attached hereto.

Respondent states that he moved for and was granted leave to appeal as a poor person by the Circuit Court of the City of St. Louis, Missouri. He subsequently was and is represented by the Public Defender of that city.

Respectfully submitted,

JOSEPH W. DOWNEY
Public Defender

HENRY B. ROBERTSON
Assistant Public Defender

RICHARD BURKE

Assistant Public Defender
1320 Market Street, Room 62
St. Louis, Missouri 63103
(314) 622-4241

Attorneys for Respondent
Willie Williams

Subscribed and sworn to before me this 19 day of January, 1982.

WILLIAM C. FRIEDRICH
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES MAY 28, 1985
CITY OF ST. LOUIS

Notary Public

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

AFFIDAVIT IN SUPPORT OF MOTION

TO PROCEED IN FORMA PAUPERIS

I, Willie Williams, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe the State of Missouri is not entitled to redress; and that I desire to oppose the issues raised by the State in its petition for writ of certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you present employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received.

Answer: No 12/77 $125.00 wk.

2. Have you received, within the past twelve months, any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Answer: No

3. Do you own any cash or checking or savings account?

   a. If the answer is yes, state the total value of the items owned.

Answer: No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   a. If the answer is yes, describe the property and state its approximate value.

Answer: No

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: N/A

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

Willie James Williams

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Henry Robertson

HENRY ROBERTSON
Assistant Public Defender
22nd Judicial Circuit
1320 Market Street
St. Louis, MO 63103
(314) 622-4241

Subscribed and sworn to before me this 19 day of Jan, 1982.

William C. Friedrich

Notary Public

WILLIAM C. FRIEDRICH
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES JAN. 28, 1985
CITY OF ST. LOUIS

FH

(Form 19 L5,51)

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PROOF OF MAILING - AFFIDAVIT

I, Joseph W. Downey, one of the attorneys for Respondent Willie Williams, and a member of the Bar of the Supreme Court of the United States, hereby certify that the enclosed Brief in Opposition to Petition for Certiorari was placed in a mailbox in this building, 1320 Market Street, St. Louis, Mo., 63103, first class postage prepaid, on January 19, 1982, addressed to the Clerk of the Supreme Court, 1 First St., N.E., Washington, D.C. 20543, within the time allowed for filing and that a copy was mailed at the same time and place to Philip M. Koppe and Steven Garrett, Assistant Attorneys General, P.O. Box 899, Jefferson City, Mo. 65102.

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St. Louis, Missouri 63103
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Attorney for Respondent
Willie Williams

Subscribed and sworn to before me this 19 day of January, 1982.

Notary Public

WILLIAM C. FRIEDRICH
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES JAN. 28, 1982
CITY OF ST. LOUIS